APPENDIX

OPINION OF APPELLATE DIVISION, APRIL 26, 1967

Respondent's motion for reconsideration is denied. The motion is grounded on Spevack v. Klein (385 U.S. 511). Respondent expressly abandoned his reliance on his federal privilege against self-incrimination (Fifth Amendment to the Constitution of the United States). He did not raise the question in the Court of Appeals but did on his application for a writ of certiorai to the Supreme Court.

Spevack prohibits a waiver of the privilege under the compulsion of the threat of loss of employment. It does not inhibit the use in a disciplinary proceeding of testimony resulting from respondent's immunity from prosecution therefor. The Fifth Amendment proscribes compelled testimony in "any criminal case." Although forfeiture proceedings have been held to be in the nature of criminal proceedings (Plymouth Sedan v. Pennsylvania, 380 U.S. 693), it has not been held that a disciplinary proceeding is in the nature of a criminal cause.

The constitutional question respondent belatedly seeks to revive does not affect the charges based on the contempt adjudication against the respondent (Ungar v. Sarafite, 376 U.S. 575) and respondent's contumacious conduct in the trial of People v. Jack (12 N.Y. 2d 721) heretofore sustained (Matter of Ungar, 25 A.D. 2d 322, app. dismissed 18 N.Y. 2d 690, cert. denied, 385 U.S. 1006), and are sufficient to warrant disbarment.

Order filed.

OPINION OF APPELLATE DIVISION, APRIL 25, 1967

Respondent's motion for reconsideration is denied. The motion is grounded on Spevack v. Klein (385 U.S. 511). Respondent expressly abandoned his reliance on his federal privilege against self-incrimination (Fifth Amendment to the Constitution of the United States). He did not raise the question in the Court of Appeals or on his application for a writ of certiorari to the Supreme Court.

Spevack prohibits a waiver of the privilege under the compulsion of the threat of loss of employment. It does not inhibit the use in a disciplinary proceeding of testimony resulting from respondent's immunity from prosecution therefor. The Fifth Amendment proscribes compelled testimony in "any criminal case." Although forfeiture proceedings have been held to be in the nature of criminal proceedings (Plymouth Sedan v. Pennsylvania, 380 U.S. 693), it has not been held that a disciplinary proceeding is in the nature of a criminal cause.

The constitutional question respondent belatedly seeks to revive does not affect the charges based on the contempt adjudication against the respondent (Ungar v. Sarafite, 376 U.S. 575) and respondent's contumacious conduct in the trial of People v. Jack (12 N.Y. 2d 721) heretofore sustained (Matter of Ungar, 25 A.D. 2d 322, app. dismissed 18 N.Y. 2d 690, cert. denied, 385 U.S. 1006), and are sufficient to warrant disbarment.

Order filed.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 25th day of April, 1967

Present - Hon. Bernard Botein, President Justice
" Benjamin J. Rabin,
" James B. M. McNally,
" Samuel W. Eager,
" Aron Steuer, Justices

In the Matter of
Sidney J. Ungar,
An Attorney.

M-1561

The above-named respondent, Sidney J. Ungar, having moved this Court for reconsideration of its order of April 21, 1966 disbarring respondent from practice as an attorney and counselor-at-law in the State of New York, and, upon such reconsideration, vacating said order of disbarment, or, in the alternative, amending the aforesaid order by inserting therein a provision that in this disciplinary proceeding and upon reconsideration there were presented and necessarily passed upon questions under the Constitution of the United States, namely, whether respondent's rights under the Fifth and Fourteenth Amendments were violated, and that said questions have not been waived or abandoned.

Now, upon reading and filing the notice of motion, dated March 9, 1967, with proof of due service thereof,

and the affidavit of Morton Liftin, duly sworn to the 9th day of March, 1967, in support of said motion, and the affidavits of Michael Franck, duly sworn to the 17th day of March, 1967 and the 22nd day of March, 1967, in opposition thereto, and after hearing Mr. Morton Liftin for the motion, and Mr. John G. Bonomi, attorney for The Association of the Bar of the City of New York, opposed, and due deliberation having been had thereon; and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the said motion be and the same hereby is denied in all respects.

ENTER:

Hyman W. Gamso

Clerk.

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the seventh day of July A.D. 1967.

PRESENT, HON. STANLEY H. FULD,
Chief Judge, presiding,

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1 Mo. No. 655
In the Matter of
Sidney J. Ungar, an Attorney,
Appellant,
The Association of the Bar
of the City of New York,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

[Seal of the Court of Appeals of the State of New York]

/s/ Geason Kimball
Deputy Clerk

[Claim of Violation of Self-Incrimination Privilege]

RESPONDENT'S [PETITIONER HERE] ANSWER TO CHARGES

* * *

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE LIMITED TO PARAGRAPH "IV-"3" and "4" OF THE PETITION:

19. Respondent testified before a Grand Jury with respect to the matters set forth in the said paragraphs. When respondent sought to waive his immunity, permission to do so was refused by the District Attorney on the ground that such waiver could not be given as a matter of law.

20. Respondent submits that the institution of the instant disciplinary proceeding on the basis of the matters set forth in Paragraph "IV", subdivisions "3" and "4", is a violation of his constitutional privilege against self-incrimination under the Federal and State Constitutions and his right to due process of law. * * * (pp. 8-9.)

* * *

AFFIDAVIT IN OPPOSITION TO MOTION TO STRIKE AFFIRMATIVE DEFENSES, FEBRUARY 27, 1963

* * *

THE FIFTH AFFIRMATIVE DEFENSE

* * *

24. We pass over the reference to self-incrimination under the Federal Constitution. In all candor, it does not seem to respondent, upon reconsideration, that the self-incrimination provisions of the Federal Constitution are involved although, of course, the right to Federal due process is involved. In this respect, petitioner would be entitled to a grant of its motion limited to striking out the reference to the Federal constitutional privilege against self-incrimination. We see no necessity to take such action with respect to a legal argument, particularly since it would require respondent to amend the answer by adding the words "under the State Constitution and his right to due process of law under the Federal and State Constitutions." * * * (p. 9.)

NOTICE OF MOTION FOR ORDER GRANTING LEAVE TO APPEAL AND AFFIDAVIT, APRIL 22, 1963

NOTICE OF MOTION

PLEASE TAKE NOTICE, that upon the annexed affidavit of Leonard B. Boudin * * * the undersigned will move this Court at a term of the Appellate Division of the Supreme Court of the State of New York, First Department, for an order granting leave to the respondent to appeal to the Court of Appeals from said order of the Appellate Division, First Department, entered on the 21st day of March, 1963 in the Office of the Clerk of the Appellate Division, First Department * * * and for the certificate

of the said Appellate Division certifying the questions of law decisive of the correctness of its determination and that in its opinion questions of law are involved which ought to be reviewed by the Court of Appeals, to wit, whether in disciplinary proceedings instituted in the Appellate Division upon a petition of a bar association, the respondent may not assert the following matters in the form of affirmative defenses:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 1-2.)

* * *

AFFIDAVIT

* * *

5. The issues raised by these affirmative defenses are important to the law governing disciplinary proceedings. The questions involve matters * * * of constitutional law (5th affirmative defense) * * *. (p. 2.)

* * *

WHEREFORE, your deponent prays for an order granting respondent leave to appeal to the Court of Appeals upon questions to be certified by this Court as follows:

* * *

5. Whether the granting of immunity to respondent by virtue of his testimony before a grand jury does not include protection against a disciplinary proceeding. (pp. 3-4.)

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL FROM ORDER OF DISBARMENT, MAY 25, 1966

Before taking up in further detail the findings and rulings of the Referee and the Appellate Division, I shall briefly enumerate the several motions and applications which were made on my behalf prior to, during and after the Referee proceedings, insofar as pertinent to the issues for appeal in this Court: The first item of the aforementioned category which needs to be mentioned is a motion which was commenced by the petitioner Bar Association, and which I unsuccessfully contested, for the striking of affirmative defenses in answer. I refer to the petitioner's motion dated January 8, 1963, supported by affidavit of Michael Franck, Esq., sworn to on the latter date. The affirmative defenses in question appear as paragraphs 6 through 27 of my answer in this disciplinary proceeding. Principally here involved are my Fourth and Sixth affirmative defenses, which pertained to the contempt charges. (pp. 19-20.)

AFFIDAVIT IN SUPPORT OF MOTION TO AMEND DISBARMENT ORDER, June 7, 1966

I respectfully submit this affidavit in [support] * * * of my presently pending motion for an order amending the within disbarment order of April 21, 1966 by inserting in said order a provision that in this disciplinary proceeding there were presented and necessarily passed upon questions under the Constitution of the United States viz, whether respondent's rights under the Fifth, Sixth and Fourteenth Amendments were violated, and that the Courts held that they were not.

* * *